OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

July 3, 2003

Mr. Oscar Treviño
Walsh, Anderson, Brown, Schulze & Aldridge, P.C.
P.O. Box 2156
Austin, Texas 78768

OR2003-4607

Dear Mr. Treviño:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 186419.

The Dripping Springs Independent School District (the "District"), which you represent, received a request for copies of the following categories of information:

1. [A]ny and all records created from January 31, 2003, through . . . May 29, 2003, inclusive, or not otherwise provided pursuant to my requests of October 22, 2002 and February 10, 2003, respectively.

2. [T]he name, policy information and contact information for the District's liability insurance carrier or carriers, and a complete copy of the District's liability policy or policies.

3. [T]he Shared Services Agreement between Dripping Springs ISD and the Hays-Blanco Special Education Cooperative.

4. [T]he job description for an Education Diagnostician.

5. [A] complete inventory of any and all documents that were knowingly withheld, and the basis for the withholding, pursuant to my request of

> of October 22, 2002, my request of February 10, 2003 and my current request.

You inform us that the District will release some responsive records to the requestor. However, you assert the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code. We reviewed the information you submitted and considered the exceptions you claim.

Initially, we note that the Act expressly incorporates the provisions of the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g ("FERPA"). Gov't Code § 552.026. Under FERPA, "education records" are those records, files, documents, and other materials that

> (i) contain information directly related to a student; and
>
> (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

Id. § 1232g(a)(4)(A). We believe that the submitted information constitutes "education records" for purposes of FERPA. *See* Open Records Decision No. 462 at 15 (1987). FERPA provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information (other than directory information) contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1). Therefore, generally, the District must withhold student-identifying information contained in the submitted records under FERPA. However, we note the requestor is a parent of a student to whom the District provides education services. FERPA gives parents the right to inspect education records to the extent they relate to their own children. *See* 20 U.S.C. § 1232g(a)(1)(A) (granting parents affirmative right of access to their child's education records). Moreover, we note that sections 552.101 and 552.103, which you assert, are preempted by federal law to the extent they conflict with FERPA. *See, e.g., Equal Employment Opportunity Comm'n v. City of Orange, Texas*, 905 F. Supp 381, 382 (E.D. Tex. 1995); *see also* Open Records Decision No. 431 (1985) (FERPA prevails when in conflict with state law). Thus, the District may not withhold the submitted information under section 552.101 or 552.103 of the Government Code.

Further, we specifically address the applicability of FERPA to the closed-session audiotapes of grievances and certified agendas you seek to withhold under section 551.104 of the Government Code. Section 551.104(c) of the Government Code, a provision of the Open Meetings Act, provides that "[t]he certified agenda or tape of a closed meeting is available for public inspection and copying only under a court order issued under Subsection (b)(3)." Gov't Code § 551.104(c). Thus, generally, such information cannot be released to a member

of the public in response to an open records request. *See* Open Records Decision No. 495 (1988).[1] However, if any responsive audiotapes pertain to matters involving a district student, FERPA requires that the student's parents be given a right of access to the tapes. In support, we note that this office consulted with the Family Policy & Regulations Office of the United States Department of Education (the "DOE") regarding a similar request. The DOE advised as follows:

> FERPA does not require that education records relate exclusively to a student or be created for any particular purpose, only that they contain information that is directly related to the student. Furthermore, the definition of "education records" is "records, files, documents and other materials" that contain information directly related to a student and there is no support in the statute that the term "education records" is limited to those that have been placed in a designated file. This was reinforced in *Belanger v. Nashua, New Hampshire School District*, 856 F. Supp. 40, 48-50 (D.N.H. 1994), where a federal court held that records pertaining to a student's juvenile court proceedings that were maintained by the school district's attorney were "education records" under FERPA. In so holding, the *Belanger* court stated that both the plain language of the statutory definition of "education records" and the legislative history of the Buckley-Pell amendment made clear that "education records" included any documents pertaining to a student that are maintained by the institution.
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> . . . .
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> In sum, and to more specifically answer your question, under FERPA, the recording you referenced is an "education record" under FERPA.
>
> . . . .
>
> We are not familiar with the state law you noted and, therefore, do not know if the law conflict[s] with FERPA. However, if the state law prohibited the school district from providing a parent with access to the education records of his or her child, that would constitute a conflict. If an educational agency or institution wishes to continue to receive federal education funds, they must comply with FERPA.

Letter advisement from Ellen Campbell, Family Compliance Office, U.S. Department of Education to Robert Patterson, Open Records Division, Office of the Texas Attorney General (April 9, 2001). In this case, because the requestor is the parent of the district student at

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[1] This office lacks the authority to review a certified agenda or executive session tape in connection with the open records rulings process. See ORD 495 at 4.

issue, we conclude FERPA grants the requestor a right of access to responsive portions of closed-session audiotapes and certified agendas that concern the requestor's child. As a state statute, section 551.104 of the Government Code cannot abrogate that right. *See, e.g., Equal Employment Opportunity Comm'n v. City of Orange, Texas*, 905 F. Supp 381, 382 (E.D. Tex. 1995); *see also* Open Records Decision No. 431 (1985) (FERPA prevails when in conflict with state law). Consequently, to comply with FERPA, the District must provide the requestor with access to any responsive closed-session audiotapes and certified agendas that concern the child of the requestor. *See* Open Records Decision No. 152 (1977) (educational institution must provide copy of education record to qualified individuals).[2] We note that FERPA does not entitle a parent to copy an education record to which the parent has a right of access, unless "circumstances effectively prevent the parent . . . from exercising the right to inspect and review the student's education records[.]" *See* 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.10(d).

However, as you contend the submitted records come within the attorney-client and attorney work product privileges, we also note that the Family Policy Compliance Office of the DOE has informed this office that a parent's right to information about her child under FERPA does not prevail over a school district's right to assert the attorney-client and work product privileges.[3] Therefore, we will consider the applicability of these privileges, which you assert under sections 552.107 and 552.111 of the Government Code, to the submitted information.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives,

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[2] If you have questions as to the applicability of FERPA to the information at issue, you may wish to consult with the DOE at 202-260-3887.

[3] We have enclosed a copy of our correspondence from the Family Policy Compliance Office.

lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." *Id.* 503(a)(5). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You inform us that the requestor, in her capacity as a parent, filed a request for a due process hearing with the Texas Education Agency on May 29, 2003. You explain the District retained your firm prior to this filing to provide legal advice regarding parent complaints about special education services provided to the student at issue. Additionally, you delineate the identities and roles of those individuals who are parties to the submitted communications. Lastly, you explain the communications were intended to be confidential and have been maintained in this manner in that they have not been disclosed to a non-privileged party. Based on your representations and our review of the information, we conclude you have demonstrated the e-mail in Exhibit 2 and all of Exhibit 3 contain information that constitutes confidential communications made for the purpose of facilitating the rendition of professional legal services to the District. Accordingly, the District may withhold this information under section 552.107(1) of the Government Code.

Next, with respect to the remaining information in Exhibit 2, we address your assertion of the attorney work product privilege as encompassed by section 552.111 of the Government Code. A governmental body may withhold attorney work product from disclosure if it demonstrates that the material was 1) created for trial or in anticipation of civil litigation, and 2) consists of or tends to reveal an attorney's mental processes, conclusions and legal theories. Open Records Decision No. 647 (1996). The first prong of the work product test, which requires a governmental body to show that the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate that 1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and 2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. Open Records Decision No. 647 at 4 (1996). The second prong of the work product test requires the governmental body to show that the documents at issue tend to

reveal the attorney's mental processes, conclusions, and legal theories. Although the attorney work product privilege protects information that reveals the mental processes, conclusions, and legal theories of the attorney, it generally does not extend to facts obtained by the attorney. *Id.*

The District explains the attorney notes in Exhibit 2 were created after receiving threats and complaints of unlawful conduct by the District. Based on the threats and behavior of the parent, counsel for the District anticipated the parent's pursuit of special education litigation. We find the remaining information at issue in Exhibit 2 consists of the handwritten notes of the attorney, which reveal the mental processes, conclusions, and legal theories of the attorney. Accordingly, we conclude the District may withhold the remainder of Exhibit 2 under the work product privilege of section 552.111 of the Government Code.

In summary, the District may withhold the submitted information under sections 552.107 and 552.111 of the Government Code. Under FERPA, the District must release any responsive portions of the closed-session audiotapes and certified agendas that concern the requestor's child.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free,

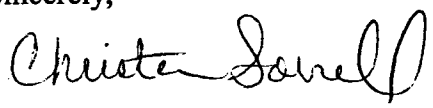
at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Christen Sorrell
Assistant Attorney General
Open Records Division

CHS/seg

Ref: ID# 186419

Enc: Submitted documents

c: Ms. Patricia Spencer-Hess
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(w/o enclosures)